UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

-against-

DOUGLASS MACKEY,

Defendant.

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21-CR-080(NGG)

United States Courthouse
Brooklyn, New York

October 26, 2022
1:30 p.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES SENIOR DISTRICT JUDGE

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(In open court.)

(All rise.)

THE COURTROOM DEPUTY: Criminal cause for oral argument. Beginning with the government please state your appearances for the record.

MR. PAULSEN: For the government, Your Honor, Erik Paulsen for the United States Government. I'm joined by William Gullotta and Turner Buford.

THE COURT: Good afternoon.

MR. FRISCH: And for Mr. Mackey, Andrew Frisch, Your Honor, good afternoon. And Mr. Mackey is present.

THE COURT: Good afternoon.

Good afternoon, Mr. Mackey.

Okay, please be seated everybody.

This is an -- this is oral argument on the defense motion to dismiss, and so we'll begin -- we'll begin with Mr. Frisch.

MR. FRISCH: Your Honor, thank you.

There's a lot of things about this case that are atypical, but there are three things that I think are especially atypical as it relates to Mr. Mackey's motion to dismiss.

First. Unlike the lion's share of cases that talk about venue, this Court ordered particulars on venue.

Second. The government's responsive particulars

fall short of every test for venue, every analysis that has ever been articulated to assure the bar from the Supreme Court that venue is narrowly construed. Whether we talk about whether the conduct here qualifies as substantial, whether we talk about whether the criminal statute's essential conduct is committed in this district as opposed to ancillary circumstances, the government's responsive particulars fall short.

And here's the third thing which I -- which is that we're assessing venue on unprecedented application of Section 241. And so, Your Honor, I think, well, what's the relevance of 241 to the argument on venue, and it's this:

That because of the very nature of crimes like wire fraud and mail fraud and securities fraud and violation of the Hobbs Act, racketeering, distribution of contraband, the very nature of these crimes typically favor permitting the government to shoot its shot on venue because of the broad concepts at issue, commerce, fraud, distribution, things of that nature.

And so over the course of time, because of the breadth of those concepts and the history and the practice of how they've been applied, the government has earned deference to be entitled to go to trial when those kinds of concepts are played.

But this case is different. The government somehow

finds room to argue that Mr. Mackey was on fair notice that the alleged conduct was criminal when Senators Schumer and Gillibrand and Klobuchar and Cardin and Obama, when he was a senator, Ms. Clinton, when she was a senator, and all the -- and others have supported legislation precisely because they don't believe conduct worse than this is covered.

And so under these circumstances where the crime -- the statutory crime is just a conspiracy, the crime is complete when the conspiracy is consummated and no part of that happened in this district, the government is not entitled to the deference that it's entitled to more broad concepts that engage in more typical cases based on commerce or distribution or wire, mail and fraud, it's wire, mail and securities fraud. They haven't earned that deference here. Here, venue needs to be narrowly construed and it doesn't exist here.

The government's theory essentially is that there is universal venue when there's something like a tweet, but that's not the law and there's no support for that. There needs to be substantial conduct or the essential -- the essential element committed in this district.

THE COURT: Well, let me -- I understand that argument.

Let me ask the government. Starting with the essential conduct test, what do you think the essential

conduct elements identified in Section 241 that would apply to this case?

MR. PAULSEN: So, Your Honor, the government would allege that the essential conduct here was a scheme to distribute misinformation about how people could cast their vote. And so in this case, the government has several venue arguments.

The first is that the tweets that were sent by this defendant were sent electronically through the Eastern District of New York as an act in furtherance of that scheme.

THE COURT: And they were sent -- you're saying you would prove at trial to the jury that they were sent through the Eastern District of New York electronically?

MR. PAULSEN: Yes, Your Honor.

As we mentioned in our brief, in the course of a conspiracy, Second Circuit law states that an electronic communication that's sent in furtherance of the conspiracy, which passes through a district like the EDNY, does give you venue.

In this particular case, the evidence indicates, which we would need to prove by a preponderance for venue, that Mr. Mackey was in Manhattan at the time, that the Twitter servers that received the tweets and then processed them and sent them back to the larger world, were on the other side of the country, and those tweets would have had to pass through

the EDNY. That is one of the four arguments that we would make.

And so I don't believe that's an extension of any particular novel venue argument. The cases are legion in this courtroom where venue is predicated on a relevant wire communication or electronic communication or a wire of money or some act in furtherance of a conspiracy that passes through EDNY.

THE COURT: All right. Thank you.

Yes, go ahead.

MR. FRISCH: Cases are legion where commerce is at issue, or distribution is at issue, or one of the more typical statutory definitions with which we deal. That's where you can argue that the phone call from point A to point B or a communication from point A to point B or receiving some contraband in a far away place bestows venue in that far away place because it's commerce or it's the effect of a wire, mail or securities fraud or it's the distribution of contraband that's -- distribution of contraband. That's not this case.

This case isn't --

THE COURT: I understand that's not this case.

This case is about a tweet that was distributed, I assume widely, that instructs the recipient of the tweet that that individual can avoid the inconvenience of going to the local polling place and can vote from home by texting Hillary

at 2 -- at 59925.

Now that's -- that's -- we're dealing here not with commerce, we're dealing here with a basic constitutional right that is being affected, potentially, by these tweets. And tweets, you know, we're not around in 1870 when Congress passed the Ku Klux Klan Act.

You know, we have to identify whether venue's proper in 2022 regarding an activity, the right to vote, that is here and now.

So, you know, you can make the argument that, you know, it's the -- that there are all kinds of rights that are attached to Congress. But this isn't Congress, I grant you. This isn't Congress. This is something else.

But this is something even more critical than Congress. And the purpose of this, allegedly, was to affect Hillary Clinton's election and it was distributed the day before the election.

So there's no doubt that this was not -- this meme was -- it would seem, at least they'll try to prove -- that the government will try to prove, this meme was not a -- was not a joke. It wasn't made in -- to be humorous. That it was intended to be a way of lowering Hillary Clinton's numbers on Election Day.

Is there any other -- is there any other explanation for the -- for the appearance of this on that schedule?

MR. FRISCH: Well, if I might, Your Honor.

Your Honor's question has three answers to it.

The venue answer, the 241 answer, and then whether there's another interpretation of what's intended by the memes.

Let me take them each at -- each one at a time.

THE COURT: Sure.

MR. FRISCH: Now matter how -- we can agree that all constitutional rights that are arguably covered by Section 241 are important. That's why they're constitutional rights.

But that doesn't mean there's universal venue in every -- in every hamlet and state, for example, because an electronic communication went from the place where the conspirators are someplace else absent more. That by itself establishes there's no essential conduct in the Eastern District of New York because --

THE COURT: Why is that? Wouldn't that be a question to ask the jury to decide in the first instance if the jury found that there was -- that your argument was correct by a preponderance of the evidence, the case would be over.

MR. FRISCH: Yes, that is correct, and I think the difficulty on the venue argument or perhaps the difficulty in ruling on this part of the motion is that typically we give the government the opportunity to go to trial and see if they

can prove it.

The problem with that here is that we know what their proof is by virtue of the particulars. We know there's no essential conduct, and how do we know that? Because the statutory definition, it's a conspiracy. That's the essential conduct test. We know that's not passed. That's not met, because the essential conduct is the conspiracy. There may be some other things that happened, but that doesn't bring it within the essential conduct test. So that brings us to the substantial context test -- contact test.

This is not substantial. And the one case that addressed an anomalous situation is *Auernheimer*, which I'll spell later for the court reporter, from the Third Circuit, where while the Third Circuit doesn't apply the substantial contact test, they -- they applied it to electronic communications and said under the particular statutes there, the crime was committed somewhere, even though the crime reached into, I think it was the District of New Jersey, and captured electronic information. That was ancillary. It was insubstantial.

If there's a substantial contact text, by definition, there has to be -- there has to be a place where there are contacts in the context of the case that are insubstantial. And when you have a statute, the essential conduct of which is a conspiracy without regard to what

happens thereafter --

THE COURT: Well, you're entering the conspiracy at the time that the actor or actors pressed the button and sent. The conspiracy -- you know, it's a convenient way of circumscribing the conspiracy to a moment in time. And I'm not sure this Court is going to be able to reach that conclusion in this case.

But -- and I'm not sure that I would agree with the Third Circuit, nor am I obligated to agree with the Third Circuit, so I just point that out.

MR. FRISCH: I understand Your Honor's point, and what I would say to it is that it's not a question of whether I'm truncating or restricting the conspiracy, it's whether what happens, the receipt of a tweet in Brooklyn, is essential conduct within the statutory definition of the crime.

I grant you things can happen that are arguably part of the conspiracy. But the essential conduct test looks at the statutory definition and says, is this essential to proving the crime or is it ancillary? And if it's ancillary, it may well be, as Your Honor says, part of the conspiracy, maybe proof of the conspiracy. It's simply not essential to prove how the crime is -- is defined, and the words of the crime.

THE COURT: There's also case law that I think has been brought to my attention that a third party acting on the

conspiracy, you know, is a part of the conspiracy, even though -- and not an intended part of the conspiracy, it still is part of the conspiracy.

I'm not saying I ascribe to that, but I think that's the argument that's being made.

Let me just hear from the government on this issue.

MR. PAULSEN: Yes, Your Honor.

THE COURT: And then I want to move on --

MR. PAULSEN: Sure.

THE COURT: -- because we have plenty to talk about.

MR. PAULSEN: Your Honor, as an initial matter, as we mentioned in footnote 12 in our brief, the Second Circuit has said the essential contact test does not have to be applied when there's an act in furtherance of a conspiracy to touch the district. I'm not sure that needs to be addressed here.

But I think it's worth stating that the acts in furtherance that we are saying passed through the EDNY are not incidental parts of the scheme. They are the tweets in question that have the misinformation. And as Your Honor points out, the government will allege that the purpose was for that information to be forwarded onward and forwarded onwards such that it would reach more people.

The conspiracy doesn't end at the moment that he sends that. The whole point of the conspiracy is that

information like this goes viral, gets spread, and so we would say this is essential conduct to the conspiracy.

I would just add, Your Honor, I know Your Honor wants to move off of venue, but the government has not tried to put all its eggs in one basket. On this matter we do allege other avenues that we believe venue could be upheld. One of them is the issue Your Honor just mentioned that if -- if the -- this information is spread with the expectation that innocent third parties will find it and forward it onwards, that could be an act in furtherance of the conspiracy. Also, case law is fairly clear that the receipt of information like this, if that's what's intended, can grant venue as well.

And, Your Honor, we do make, I wouldn't call it a universal venue argument, but in a situation like this, I think it bears repeating that -- you mentioned a moment ago that when the Ku Klux Klan Act was written Twitter didn't exist, the internet didn't exist, telephones didn't exist.

This courthouse has seen cases where fraudulent materials are sent out to -- by phone to various different districts, 15, 20 districts, and the court and the Second Circuit afterwards would hold that venue is appropriate in any of them because they availed themselves of those many districts.

We are in a unique spot where if the government's allegations are true, which is -- would be held to be true for

this motion, if a scheme's intent is to spread something everywhere, it strikes us that the defendant should reap what he sows when it comes to venue. And then I don't think it's necessary for this case necessarily, because I think we have other grounds for venue.

(Court reporter interrupts for clarification.)

MR. PAULSEN: I wrote "slow" on my pad and I'm not listening to myself.

But in a situation like this where the point was to spread it everywhere, there's something odd to say that despite wanting it to go everywhere, they are only subject to venue in one spot. The venue does not befit the aspirations of the crime.

THE COURT: I'll give you the last word on venue.

MR. FRISCH: There's a reason why the Supreme Court says that -- the one thing that hasn't changed over the last 150 years, if I have done my math right, I think that's right, is that venue needs to be narrowly construed and it needs to be focused on where the conduct occurred.

There is no such thing as universal venue, especially on a statute which doesn't have commerce, it's the conspiracy. The conspiracy that happened here, the fact that a tweet found its way to Brooklyn or Nassau or Suffolk is not enough to create substantial, and certainly not essential under the definition of the statute, and it is certainly not

substantial.

THE COURT: Well, I'm not sure that the Supreme Court, if it had a case such as this, would find one way or another in the electronic age of how to reform venue or to define venue in a broader context. But it is clear that the reach of the internet is so broad that the effects of communicating by Twitter, for instance, can be extremely -- it can also be extremely widespread.

So we're sort of in the new age. And we have to bear that in mind, and in a sense this is a case of first impression, I think, in some ways, and I'll just grapple with all these issues and do my very best. Okay?

Can we go on?

MR. FRISCH: We can go on to the next issue. I'm going to -- I am going to piggyback on something Your Honor just said as I go into the next issue, which is the new age concept.

THE COURT: I'm not sure the Supreme Court will be interested in new age issues.

MR. FRISCH: Well, they might on this one, on this next issue, and the reason I --

THE COURT: Oh, you are now going into the next issue, you are now moving on?

MR. FRISCH: I was trying to make a clever segue, but I --

THE COURT: All right. Well, you've done enough, go ahead.

MR. FRISCH: It wasn't smooth. But I am going to try -- I'm going to press forward.

Here's what we know: Congress doesn't believe that conduct worse than this is covered by the existing language of 241. This goes to the fair notice, fair warning to Mr. Mackey about the alleged conduct.

It seems incongruous -- it seems incongruous that the government says that Mr. Mackey was on fair notice and fair warning that these alleged retweets are within the scope of 241 when far more serious, what I'll call for purposes of today, alleged misinformation are expressly cited by Congress and multiple senators in support of what they say is an urgent need for legislation that's narrowly tailored to address the First Amendment to get at this.

For the last 17 years, at least the last 17 years, beginning with Senator Obama in 2005, Congress has continued to press this deceptive practices law. It's been introduced in the Senate and the House umpteen times by a variety of different senators, I believe most recently Senators Klobuchar and Cardin within the last two years. It doesn't pass.

And I think the Senate and the House and Americans generally would agree that the reason why this legislation is being pressed is because there's a need for a remedy. But the

reason it hasn't passed is precisely because of the difficulty in threading a constitutional needle through the First Amendment.

Whatever the reason is, it's hard to argue that Mr. Mackey should have seen this alleged conduct to be criminally prohibited when some of the great senators of our time and over the past 15, 17 years don't see it that way.

I also think that Congress understands that the government, and I mean all three branches of government, to be a steward of the marketplace of ideas, and this gets back to the question that I didn't answer the first time but I'll get back to it now.

You can look at these memes, and you can take a nefarious view of them and infer an intent to dissuade or mislead a certain category of voters. You can also see it as satire or provocation.

The point is, and I think one of the reasons why this legislation has been difficult to get through, is because the way we do things in this country is we put these things out there in the marketplace of ideas. We don't allow the government, certainly not the Executive Branch and certainly not the Department of Justice in a criminal case, to be the ministry of decorum, absent legislations, to be sure, or the ministry of truth, where crossing the line is in the eye of the beholder.

THE COURT: All right. You know, looking at this, your argument is, in part, that this could be viewed -- this communication could be viewed as satire, like The Onion, that it's some sort of a satirical presentation that people would not take seriously, but apparently 4900 people saw this and, at least according to the government, responded the day before the election.

And there's a question of -- there's a question of the timing and the idea that this is -- might be an -- serve an educational, informational function, how would this serve any of those functions logically, and isn't it a question for the jury to decide what function it's serving, because I think a jury could look at this -- maybe you can convince the jury that it was satirical, or that it was simply informational, or that it was a reminder to go vote. But it is also possible that a jury could find that the intent was to deceive and to -- and to affect the outcome of the election in a manner that was detrimental to our democratic norms.

I mean, I'm just wondering as someone who's actually been involved in public service for a long time that the fact that a few senators think that there's a -- that they need to do something about this, I'm not convinced that I'm somehow hamstrung because Congress can't pass a law. They can't pass a lot of laws, but that doesn't mean that the rights of citizens are derogated because Congress hasn't been able to

put a finer point on something.

MR. FRISCH: Well, I think it's a question -- excuse me, three things.

Number one, I think it's a question of fair notice. The reason we're talking about Congress and these senators and the urgency with which they had pressed this legislation for so many years is putting aside the underlying problem which is crying out for a remedy, no question about that, is that they don't think it's covered. Most of them lawyers. Most of them politically savvy and sophisticated. If they don't think that the statute covers it, how can a citizen believe that this alleged conduct is covered? How can they have fair notice and have fair warning when the people who run the country and do legislation don't.

I take your point about the different interpretations of this and whether it's satire or whether it's not.

My point is that absent legislation that's narrowly tailored, the government, certainly not the Department of Justice, should be the ministry of decorum or the ministry of proof on that question and require a criminal defendant to explain themselves.

THE COURT: Okay, I understand. Let me just -- let me hear from the government on it.

MR. PAULSEN: Yes, Your Honor.

I think Your Honor's correct. The fact that Congress doesn't act on a thing I think does not suggest that it's not illegal.

Senator Klobuchar, for example, on October 31st of 2017, about a year after the election, held a hearing on this sort of conduct. She grilled the CEO of Twitter and confronted a three-by-two-foot picture of one of Mr. Mackey's tweets, pointed at it and said, "This is illegal." This was in the context of attempting to pass additional tools that the Department of Justice can use to deal with this pressing issue.

The fact that the Congress has been consistently trying to add tools to deal with this fairly baneful conduct does not mean the existing tools can't reach it. Congress is frequently trying to add tools such that prosecutors can reach conduct that's creating a problem.

THE COURT: Has Congress passed -- I'm sorry. Has 241 been used in the context of voting cases, to your knowledge?

MR. PAULSEN: Dozen upon dozens of times, Your Honor. It's -- frankly, it's probably the core issue that 241 has been used for.

The history of 241, Your Honor, is frankly a history of it being expanded to different types of voting cases, whether it's confusing ballots, or people interrupting

individuals trying to get to the poles, or destruction of tallies. I think that's, frankly, what 241 has frankly been about.

We've mentioned a number of these cases in our brief. There's been a long line of cases starting with *Yarbrough*, continuing to *Classic*, continuing to *Lanier*, continuing with *Stone* before then, and *Tobin*, one of the more recent ones that focus on voting.

Voting rights is one of the key considerations of 241, and I think it's relevant, Your Honor, for a fair warning analysis.

I think some of what the defendant is doing here is focusing on the means by which the conspiracy accomplished its aim rather than the actual prohibition itself. I think it's beyond depth that the right to vote is a constitutionally-protected right, and 241 is the tool that is used to prosecute conspiracies to injure that right.

The ways in which individuals have conspired to injure those rights have changed over time, they changed over a hundred years, and we now in the modern age and it's changing again.

But the reasonable person in the United States has fair notice that the right to vote is important, and that efforts to infringe it, into -- oppress it to injure it are prohibited. That -- the nuances and how they might do that

might change is to be expected, Your Honor.

THE COURT: Well, all right, I think it's been well briefed.

MR. FRISCH: Can I say one point on that --

THE COURT: Sure.

MR. FRISCH: -- if I can respond to it, and I'll be brief.

The answer to Mr. Paulsen's argument is in the very comprehensive compendium of election fraud cases put out by the office to which Mr. Gullotta belongs.

There is not a case like this in it. There are voting rights cases, but cases within 241, as it relates to voting, have either language, which is intimidation, language of intimidation, language of threat or physical acts, like forging ballots or destruction of ballots.

And putting voting aside, there are cases, and the government cites one, where there were false police reports. It is an Eastern District of Michigan case where officers created false police reports to cover up that they were robbing drug dealers at gunpoint. Those things are something different than mere speech, which is not threatening, not intimidating, and isn't a physical act.

And so while Your Honor is correct to ask the question whether 241 covers voting, it does. And while the government is correct to point out the rich history of the

application of 241 to voting, it's never been used like this before.

THE COURT: Well, I think that the question is whether a much more sophisticated approach to affect the outcome of an election through fraud, that's alleged here, is acceptable because there's no person standing with a gun at the door of the school where the voting is taking place.

I think that -- you know, as I said at the beginning, this statute has developed its application over the years based upon changes in circumstances that could not have been contemplated in 1870. And, quite frankly, looking at this from the standpoint of sophistication, one could argue, I think that's what the government does, the government could argue that this is a far more sophisticated means of unlawfully affecting the constitutional right to vote.

So, you know, you're saying -- the defense is saying, well, Congress hasn't done anything to make it clear, but the government is saying that the statute is sufficient to handle this type of nuance approach to manipulating, you know, the system of voting, which is a constitutional right.

I mean that's really -- that's a large part of what we're discussing here.

MR. FRISCH: Well, if I may, Your Honor, this isn't a question of the means.

If Mr. Mackey used electronics in some form to forge

ballots, I'm certain there's a way to do that, given technology these days. If he used electronics to destroy or threaten or intimidate or do some of the things that plainly are within Section 241's scope, he wouldn't stand on ceremony and say, well, I -- I did it all electronically, therefore, it's not covered. It would be covered.

The problem here is that it's the nature of the conduct, not the means. The conduct is not previously, in fact, never been applied. The statute has never been applied to this kind of conduct.

If you look, and we cited it in our reply papers, I think it's in the main brief as well, the specific examples that Congress had in mind that Congress believes are not covered by the statute, which are far worse than this. If those things had been electronic or not, it wouldn't matter, you know, giving -- saying if you come to vote, we're going to arrest you for parking tickets or Republicans vote Tuesday, Democrats vote Wednesday. It is not whether it's the means or not, yes, the means has changed and society has to adopt to different methodologies, but that's not what this is about.

This is about speech. Speech that's deceptive, speech that's less severe or less problematic than the specific examples on which Congress has not acted.

And, again, I understand the Court's concern about the overall scope and the remedy for this, but apart from the

limited scope of Section 241, what's at the heart of the -- my citing to Congress, Congress and the senators, is fair notice and fair warning. Because they don't believe more serious conduct is covered by the statute.

It's hard to say that the citizen should believe that a retweeted meme, however you want to interpret it, give it a nefarious -- the most nefarious interpretation possible or something more benign, that he or she should understand that he has been fairly noticed or warned that this is criminal conduct.

THE COURT: Anything else?

MR. PAULSEN: Your Honor, I addressed the fair warning a moment ago, so I'll leave that as it is.

I would just note that I think the speech issue is a bit of a red herring here. Supreme Court case law is very clear that when speech is used in service of a criminal act, it doesn't get that same First Amendment protection.

When somebody sends out a scam, charitable flier saying please donate to my charity but then takes the money, even if they are commenting on political issues, that false statement is -- is -- the government will criminalize it.

There's a very well-known Supreme Court case, *Giboney*, which -- it's 336 U.S. 490, it's often cited for this point. It's a -- an old antitrust case in which during a union fighting, one of the sides had picketers block the

company. They -- free association that you would normally say is protected speech. But it was done in service of a scheme to interrupt and violate an antitrust law. And what the Supreme Court says in that case:

"It has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."

It's always been the case that speech that is used to effectuate a criminal plan like this doesn't get covered. That's why 1001 exists. That's why perjury exists. It's why false statements laws exist. It's why when somebody fills out a form inaccurately to the government that doesn't count as First Amendment. That's why fraud cases and deceit cases generally can be prosecuted. This is a red hearing.

THE COURT: All right, let's go on to the First Amendment.

MR. FRISCH: Can I just -- I think I just -- if Your Honor would just permit me just to respond briefly to that. I won't -- I won't belabor it.

THE COURT: Go ahead.

MR. FRISCH: But the government is mixing apples oranges and bananas. There are certain types of speech that are not permitted. If it's commercial speech. If it's based

on defrauding people financially. If it's based on commerce. There's -- if it's obscene. If it's bribery.

There are number of examples. If it's a 1001 violation, which the government cites. There are a number of ways in which that kind of speech is not permissible and can be criminal.

But this, this information in the context of politics, whether you --

THE COURT: It's not politics. Let me start with this. If proven, defrauding individuals of their constitutional vote, it's not politics. Whoever they want to vote for, is not politics. That's their business.

If the speech, you know, misstates a person's views -- a politician's views and is, you know, a part of the discourse. But what is alleged here is that the, quote, speech that is contained in this meme, that has been presented, is intended to -- is intended to take away an individual's right to vote by conveying the impression that by responding to this electronically -- to vote electronically, would register a vote for that -- for, in this case, a presidential candidate.

I mean this isn't -- you know, money is one thing, but a constitutional right is more sacred than money in the view of many people, including this Court.

So I just point that out, and I think -- you know, I

don't want it to appear that the Court sanctions or would agree that to deprive someone of a vote by engaging in some sort of fraud would be -- would be, you know, less serious than some sort of commercial speech violation. That's all I'm saying to you.

So I don't know whether you're right or you're wrong on the ultimate outcome of this issue, but the right to vote is sacred. Many thousands of people have died to protect our constitutional right to vote in a democratic republic. I don't think there's anything more important that is done by the government than securing and protecting and promoting the right to vote.

So we'll start on that, on that lofty claim. So I don't -- you know, the discussion of commercial speech, and the discussion of some senators, who think that they can put a finer point on something, doesn't mean that you're right, and it doesn't mean that you're wrong.

I want to go on to the First Amendment issue.

MR. FRISCH: May I, Judge?

THE COURT: Go ahead.

MR. FRISCH: So the right to vote is sacred, and so is the right to free speech. And the danger, notwithstanding how a particular person could look at the alleged conduct here, whatever it is, whether it's good, bad or indifferent, accepting Your Honor's view, accepting a different view, the

problem with prosecuting it criminally is it makes the government, and all branches of the government, especially the Department of Justice, a ministry of decorum. You know, on what is pure speech, which is not independently a crime, which is not independently a fraud, it's pure retweeted speech.

And maybe there are hypothetical situations, maybe it's this one, where we can agree that this crosses the line. But there could be someone else who looks at this and other kinds of conduct that could be swept into this where we might think it doesn't cross the line, but someone else might.

It's not the content, it's the right to say it. And that I think is why this is such a difficult issue for Americans, not just for Congress but for all of us, because we're watching the news everyday, we understand what's going on, is that we're trying to balance and find a way of accommodating a variety of sacred rights. All of which we hold here, one of which is the right to vote, one of which is the right to freedom of speech.

While I understand the sentiments that Your Honor has expressed, when we find ourselves in a criminal courtroom, and someone facing jeopardy of liberty, more needs to be shown about that speech than the fact that it was said. It needs to be tethered to one of those other things. One of those other types of speech that's prohibited.

As sacred as the right to vote is, the right to

freedom -- the First Amendment right is also so sacred that sometimes we allow things to be said in the marketplace of ideas. Sometimes we allow things to be retweeted or tweeted. Sometimes we allow these things because we have confidence as Americans that if the debate is freely permitted to continue, we'll figure it out. We'll work it out. We'll figure out what's on the right side of the line and what's on the wrong side of the line without resorting to criminal process, which carries more risks than benefits.

THE COURT: Well --

MR. PAULSEN: Your Honor, you mentioned before the importance of the right to vote. One of the cases we cite, *United States versus Benson*, a case which the right to vote was weighed against the First Amendment rights, it notes that the right to vote is the right that secures all other rights. And in that case, the right to vote triumphed over the First Amendment considerations.

I think defense counsel mischaracterizes the nature of the speech here. The government's allegations here are: We are not saying that this scheme was meant to spread disinformation about an issue, about policy, about a politician, about anything of that sort, it's about process. It is about trying to fool people out of voting, out of exercising the franchise. Not the choice they make once they get there, it's the actual right to vote, which is the core

heartland behavior for this particular -- for this statute.

I think what was being alleged here fits within that framework that has been prosecuted by the Department of Justice for over a hundred years.

THE COURT: Anything else?

MR. FRISCH: Two points.

One is that this case -- a case like this has never been prosecuted before. Number one.

Number two, I just want to correct for the record -- it's in the papers, I think Your Honor realizes it, but I just want to state it to make sure -- that the 4900 people alleged by the government are people, as I understand it, who responded nationwide, I think I have that right, to the retweeted meme. But there's no proof that any of them were registered voters, and there's no proof that anyone failed to vote as the result of believing that an anonymous text would qualify as a vote for President.

MR. PAULSEN: And, Your Honor, I can speak to that briefly.

We've provided information to defense counsel that shows that when this tweet was sent out, and it indicated that voters of a particular candidate could vote by text, various individuals responded to try to put up warnings that this was not actually real. And so despite the fact that people still texted in and this meme bounced around the internet, shortly

thereafter people got a response message saying this is -- this was not authorized by the campaign and things of that sort.

The government is not prosecuting the effect of this, we're prosecuting the conspiracy to do it. And the -- we are -- we understand our burden, and we've been, I think, clear with defense counsel about what the other issue is.

THE COURT: Okay. Thank you very much. Very interesting.

Thank you for coming up from Florida; is it?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

Anything else for today?

MR. PAULSEN: No, Your Honor. We're happy to answer any questions you might have.

THE COURT: I think I've heard and seen and read a great deal about this, and I appreciate everyone's excellent briefing, and so I will let you know.

MR. PAULSEN: Thank you, Your Honor.

THE COURT: Thank you very much.

MR. FRISCH: Thank you, Judge.

MR. PAULSEN: Your Honor, my colleague did mention to me, I think we had excluded time up and to this date, and so...

THE COURT: Time is excluded until the -- until

decision, plus ten days.

Is that agreeable?

MR. FRISCH: It is, Judge, of course.

MR. PAULSEN: Thank you, Your Honor.

THE COURT: Thank you.

Have a nice day everybody.

(Whereupon, the matter was concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Linda D. Danelczyk October 30, 2022

LINDA D. DANELCZYK DATE